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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW - Room 222
Washington, DC 20554

RE: _Ex Parte_ Notice
CC Docket No. 96-45

Dear Ms. Salas:

On November 5, 1998, the attached letter with attachments was sent to Chairman Julia Johnson of the Florida Public Service Commission regarding the USTA Universal Service Plan for non-rural carriers.

An original and one copy of this *ex parte* notice are being filed in the Office of the Secretary. Please include it in the public record of the above-referenced proceedings.

Respectfully submitted,

John W. Hunter
Senior Counsel

Attachment (1)

cc: Members of the Federal/State Joint Board on Universal Service
Staff of the Federal/State Joint Board on Universal Service

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UNITED STATES
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USTA 100 Years 1897-1997

November 5. 1998

Chairman Julia Johnson
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

Dear Chairman Johnson:

We were certainly pleased to meet with you last week when you were in Washington to discuss the USTA Universal Service Plan for non-rural carriers. We greatly appreciate your and Walt's time.

During our discussion, we agreed to provide you with both a policy and legal analysis for basing the plan on interstate and intrastate revenues. SBC has prepared the enclosed benefits assessment and BellSouth has provided the enclosed legal analysis. Both of these documents have been placed in the public record in CC Docket No. 96-45.

Please let us know if we can provide any additional information. My best regards.

Sincerely,

John W. Hunter
Senior Counsel

Enclosures (2)

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The Benefits of Funding Federal Universal Service Programs Through a Surcharge on Interstate and Intrastate Revenues

USTA proposes to fund Federal Universal Service through a uniform surcharge on all end user total (interstate and intrastate) telecommunications revenues. The benefits of using total revenues rather than only interstate revenues include simplicity, improved customer understanding, avoidance of jurisdictional arbitrage and a reduced overall surcharge level. These benefits are described in further detail below.[1]

The recent experiences related to the establishment and pass-through of PICC charges by carriers demonstrates the advantage of implementation simplicity. Customers were confused both by charges that varied by provider (and the associated explanations), as well as by different rate levels for residence and business customers and primary vs. additional lines. A uniform surcharge on all telecommunications services will avoid such confusion. Additionally, the FCC's recent Universal Service decision[2] on the jurisdictional classification of wireless carriers' traffic demonstrates the complexity imposed when only interstate revenues are utilized.

Using total telecommunications revenues will facilitate consumer understanding of the application of charges. Consumers view calls functionally rather than jurisdictionally, not caring if they are local, intrastate or interstate. At minimum, another entry on customer bills that applies to some services and not others will certainly generate numerous calls to customer service representatives seeking explanation or clarification.

Imposing surcharges on only interstate telecommunications services will create distorted economic incentives to purchase services from intrastate tariffs or to misreport

[1] The legal basis for applying the surcharge is described in a separate USTA whitepaper.

the jursidictional classification of traffic to avoid the interstate-only surcharge. Recent analogous events suggest that arbitrage and misreporting are not merely speculative concerns. For example, in 1997 Southwestern Bell's FGD measured terminating minutes were approximately 60% interstate, while unmeasured, customer-reported FGA and FGB minutes exceeded 90% interstate. Likewise, not all FGD minutes can be measured and similar anomalies exist. For example, in 1997 more than 40% of one large IXC's terminating FGD minutes were unmeasured and the customer-reported interstate usage was 25% higher than its measured interstate usage.[3] USTA proposes that any intrastate universal service fund likewise be funded through a surcharge on total telecommunications revenues.

Finally, by expanding the base of revenues, the necessary surcharge level is reduced. USTA estimates that the necessary surcharge level would be approximately 2.15% on total telecommunications revenues, compared to an approximate 5.63% surcharge level if it were only imposed on interstate revenues. The approximately $4.3B generated by this plan would permit elimination of the implicit subsidy that is today recovered through interstate CCL and PICC charges.

For the reasons described above, a uniform surcharge on all end user total (interstate and intrastate) telecommunications revenues should be included in the Joint Board recommendation.

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[2] CC Docket 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, adopted October 22, 1998

[3] For Southwestern Bell Telephone Company, interstate minutes are lower-priced than intrastate minutes.

The Joint Board and the Commission have the authority to use combined interstate and intrastate revenues of interstate carriers as the revenue base for determining the interstate carriers' contributions to the federal Universal Service Fund ("USF"). The starting point of the analysis is the express language of the statute. The first instance in which the contributions to the USF are mentioned in the Communications Act is in Section 254(b). Section 254(b) enumerates universal service principles that the Joint Board and the Commission "shall base policies for the preservation and advancement of universal service..."[1] Among the enumerated principles is that "all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."[2] Congress embodied this principle in the specific statutory directive relating to contributions of telecommunications carriers. Thus, the statute mandates that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis" to the federal USF.[3]

The Commission has considerable discretion in selecting the revenue base to be used to determine the contributions of interstate carriers to the federal USF. As the Commission has recognized, Section 254(d) enables the Commission to use interstate and intrastate revenues as the revenue base for determining USF contributions to ensure that the universal service fund is sufficient.[4] As long as the contribution mechanism encompasses all interstate carriers and is nondiscriminatory and equitable, the mechanism passes statutory muster.

Use of interstate and intrastate revenues meets the nondiscrimination requirement of Section 254(d). All interstate carriers would be treated identically. That is all that the nondiscrimination condition requires. Even if, however, the use of combined interstate and intrastate revenues were viewed as not a completely nondiscriminatory approach, which is not the case, the other condition of Section 254(d) is that contributions be made on an equitable basis. An equitable contribution mechanism is not necessarily a nondiscriminatory mechanism. Nondiscrimination implies that all similarly situated carriers are treated the same. An equitable contribution mechanism implies a mechanism that is considered fair. Thus, a fair mechanism may not treat all contributors identically or may not have the same impact on all contributors. To the extent there is a tension between the nondiscrimination and equity requirements of Section 254(d), the Joint Board and the Commission have the authority to weigh one factor against another to determine the balance that promotes the public interest.[5]

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[1] 47 U.S.C. § 254(b).

[2] 47 U.S.C. § 254(b)(4).

[3] 47 U.S.C. § 254(d)

[4] *In the Matter of Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, 9192-9194 (1997).

[5] *See generally Southwestern Bell Telephone Company et. al. v. FCC*, 1998 WL 485387, *4 (8th Cir.).

Equitable considerations favor combined interstate and intrastate revenues as the revenue base for the contribution mechanism. There are interstate uses that are reflected in intrastate end user revenues such as private line uses, leaky PBX traffic and connections to internet providers. As these segments of intrastate revenues increase, a mechanism based on interstate end user revenues alone could considerably understate interstate revenues in general, but more importantly, the mechanism could result in more favorable treatment to a limited class of interstate carriers such as those providing local services. Not only would such a result be inequitable but also, in practice, it would be discriminatory. In these circumstances, the Commission can exercise its discretionary authority as the administrator of the statute to select a contribution mechanism that it deems in its expert judgment promotes the public interest and statutory objectives. Where the Commission explains its determination, Courts will substitute its judgment for the predictive judgment of the Commission.[6]

A contribution mechanism that is based on combined interstate and intrastate revenues does not mean that intrastate revenues will be used to pay for the federal USF. Any contributions for the federal USF assessed on interstate carriers constitute an additional interstate cost. Each carrier is entitled to recover its interstate cost. The rates and charges that a carrier establishes to recover its federal USF contributions are jurisdictionally interstate and generate jurisdictionally interstate revenues. Accordingly, a combined interstate and intrastate revenue base does not impact a state commission's authority to regulate the rates and charges for intrastate charges that is reserved to it under Section 152(b) of the Communications Act.

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6 *Cellnet Communications Inc. v. FCC*, 149 F. 3d 429, 441 (6th Cir. 1998).